prosecution or the defence in accordance with the provisions of section 113(ii). If the procedure prescribed under section 145 of the Evidence Ordinance is not adopted and the witness's attention is not drawn to the written record, it cannot be used as evidence and the police officer cannot be asked about it. Cross-examination of the witness must be confined to the contradiction between the two statements and only those portions of the statements as have been used to contradict the witness should form part of the judicial record. Other parts of the statement cannot be relied upon by either the prosecution or the defence in determining the guilt or innocence of the accused and should not be relied upon by the court.

Solicitors: *T. K. Lim & Co.*

PUBLIC PROSECUTOR v. YEO KIM BOK

[O.Cr.J. (Sharma J.) October 31, 1970]

[Muar — Criminal Trial No. 3 of 1970]

Penal Code, s. 102 — Extent of right of private defence — Continuance of — Onus on party setting up the right of self defence — Submission of no case to meet.

The accused in this case was charged for having committed culpable homicide not amounting to murder by causing the death of one Lee Peak on January 28, 1970 at 8.30 p.m. with the knowledge that the act committed by him was likely to cause the death of the deceased. At the end of the prosecution case defence counsel submitted that there was no case for the accused to meet. It was clear from the prosecution evidence that the deceased and the accused had prior to the incident some money dealings and that the deceased had lent some money to the accused and had demanded its repayment. This was when he found the accused in a coffee shop, the deceased demanded repayment of the loan in a very aggressive manner and on seeing the accused remaining calm and passive went to pick up a knife when the accused was possibly going out of the shop through its rear door. After having picked up the knife the deceased rushed towards the accused who had no way to escape. Finding himself in that desperate situation the accused turned back, picked up a wooden ladle and with it hit the knife which was held by the deceased. As a result of this the knife fell on the ground and both the accused and the deceased started to grapple with each other and fell down rolling on the ground endeavouring to pick up the knife which had fallen from the hand of the deceased. This struggle lasted for a short while after which a witness saw an object in the hand of the accused. This object looked like a knife. The accused remained pinned under the deceased most of the time except on one occasion. According to the evidence the deceased was a man of better build and strength than the accused. There was no doubt that it was the act of the accused which caused the death of the deceased. The questions which had to be decided were whether the defence had established the right of self defence, and whether there was continuing danger and a reasonable apprehension of such danger.

Held: (1) there was a reasonable apprehension of danger to the life of the accused when the deceased rushed at him with the knife in his hand and at that stage he had the right of private defence which extended even to the killing of the deceased;

(2) in the light of the evidence produced by the prosecution there was a reasonable possibility, nay probability, that if the deceased had himself managed to get hold of the knife, he would have struck some blows with the knife on the accused. In the circumstances and in the situation in which the accused found himself there was bound to be in his mind a reasonable apprehension of death or grievous hurt being caused to him by the deceased unless he got out of the reach of the deceased;

(3) the defence has through the prosecution witnesses proved that the accused was acting in his right of private defence. It is reasonable to suppose that the accused thought in the critical situation in which he was that the deceased might wrest the knife from his hand and use it against him. The reasonable apprehension of death at the hands of the deceased could not thus be said to have left the mind of the accused. In the circumstances there was no case to meet.

CRIMINAL TRIAL.

Ahmad Fairuz bin Dato Sheik Abdul Halim (Deputy Public Prosecutor) for the prosecution.

Elyas Majeed for the accused.

Sharma J. (delivering oral judgment): The accused in this case has been charged for having committed culpable homicide not amounting to murder by causing the death of one Lee Peak on the 28th January, 1970 at 8.30 p.m. with the knowledge that the act committed by him was likely to cause the death of the said Lee Peak.

At the end of the prosecution case the defence counsel has submitted that there is no case for the accused to meet. It seems clear from the prosecution evidence that the deceased and the accused had prior to the incident some money dealings and that the deceased had lent some money to the accused and had demanded its repayment. This was when he found the accused in the coffee shop at premises No. 34 Jalan Abdullah, Buloh Kasap, Segamat. According to P.W. 4, who was at the relevant time an assistant in the said coffee shop, the deceased demanded repayment of the loan in a very aggressive manner and on seeing the accused remaining calm and passive went to pick up the knife (Exhibit P5) when the accused was possibly going out of the shop through its rear door. After having picked up the knife the deceased rushed towards the accused who, according to P.W. 4, had no way to escape. Finding himself in that desperate situation the accused turned back, picked up a wooden ladle and with it hit the knife which was held by the deceased. As a result of this the knife fell on the ground and both the accused and the deceased started to grapple with each other and fell down rolling on the ground endeavouring to pick up the knife which had fallen from the hand of the deceased. This struggle lasted for a short while after which P.W. 4 saw an object in the hand of the accused. This object looked like a knife. The accused remained pinned under the deceased most of the time except on one occasion. According to the evidence the deceased was a man of better build and strength than the accused. I have no doubt in my mind that it was the act of the accused which caused the death of the deceased. The only question which I have to decide at this stage is whether the defence has established the right of self defence. There is a conflict of testimony between P.W. 4 and P.W. 5. P.W. 5 was in the coffee shop only for a few seconds. When he came into the coffee shop he saw the accused and the deceased struggling in a standing position and the accused holding a knife in his hand. He thereupon ran out of the shop to make a report at the police station. This testimony is in conflict with the testi-

mony of P.W. 4. I will, however, read out a few relevant passages from the evidence of P.W. 4 in order to decide the question which is raised at this juncture: —

"The deceased was very aggressive in demanding the repayment of the loan. The accused was calm and passive. When the deceased asked for the wrist watch of the accused he was still very aggressive. The aggressiveness came only from the deceased. The accused was quiet and passive all the time while the deceased was making his demands. The deceased shouted at the top of his voice. When the accused went to the rear of the coffee shop I thought he was only trying to avoid the deceased. The deceased ran to the front of the shop in order to pick up Exhibit P5 and having picked up Exhibit P5 he ran towards the accused. The deceased was very furious.... The deceased in fact threatened to kill the accused. He said so and chased after the accused. I thought in that mood and the behaviour he displayed he did mean to kill the accused. I had that fear in my mind.

If the accused had not hit the knife (Exhibit P5) with the ladle (Exhibit P4) the accused would definitely have been killed by the deceased. I did not see the accused pick up Exhibit P5 after it had fallen to the ground. I, however, did see that both of them were trying to pick up Exhibit P5 while rolling on the ground. I could still see the knife. It was still very close to both of them.... It was a very violent struggle by both of them. The deceased was most of the time on top of the accused....

It was not possible for the accused to get up and run away as his body was grabbed by the hands of the deceased. At the time the accused was on top of the deceased the accused was not holding any object in his hand. I saw the object in the hand of the accused only when he was under the deceased."

It has been suggested to me by the prosecution that I should accept the evidence of P.W. 5 and find that the accused had exceeded the right of private defence from the moment he had obtained possession of the knife (Exhibit P5). The court may be entitled to accept a part of the evidence of one witness even if it be in conflict with the evidence of another witness but only in appropriate cases after having due regard to all the facts and circumstances of the case. P.W. 5 was in the coffee shop only for a few seconds and there is no reason which may justify me in ignoring the evidence of P.W. 4 on a vital matter. Whether the accused in the course of the struggle was able to take possession of the knife which was originally held by the deceased and that he was seen holding this knife either in the standing position or in the rolling position, in fact, makes no difference. The evidence shows that the deceased was to start with the aggression and the impression he gave P.W. 4 was that he was in a mood to kill the accused. Section 100 of the Penal Code reads:

"The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated —

First — Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly — Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;"

It is not necessary to concern ourselves with the other clauses of section 100 in this particular case. Section 102 of the Penal Code goes on to say:

"The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues."

I have no doubt that there was a reasonable apprehension of danger to the life of the accused when the deceased rushed at him with the knife in his hand and at that stage he had the right of private defence which extended even to the killing of the deceased by the accused. The difficult question, however, is whether that right continued to exist at the time he dealt with the fatal blow to the deceased. I think I can do no better than quote a few passages from "Culpable Homicide and Legal Defence" by *K. C. Mehrotra:*

"Section 100 does not lay down grievous hurt must be actually caused by the assailant before the right of private defence is available to the accused. All that the section requires is that the person claiming the right of private defence be under a *bona fide* apprehension of fear that death or grievous hurt would otherwise be the consequence of the assault on him if he does not defend himself.

What constitutes a reasonable apprehension of death or grievous bodily injury is always a question of fact to be decided upon the peculiar facts and circumstances of each case. The source of apprehension can be the weapon, the manner of its use, the mental and the physical attitude of the person uttering the threat, his capacity to execute the threat and so on and so forth. The relative strength of the combatants is sometimes material....

It is for the court to decide if the violence threatened was under the circumstances sufficient to have caused in the mind of the accused a reasonable apprehension of grievous injury....

To begin with the person exercising the right of private defence must consider whether the threat to his person is real and immediate. If he reaches the conclusion reasonably that the threat is real and immediate, he is entitled to exercise the right. One of the requisites of section 100 is that a person must feel a reasonable apprehension of death or grievous hurt as a result of the assault contemplated on him. As soon as he is faced with an assault which causes a reasonable apprehension of death or grievous hurt, allowance has necessarily to be made for his feelings at the relevant time and it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room."

The author goes on to give some tests to serve as guidelines to determine whether a person has or has not exceeded his right of private defence or has inflicted more harm than was necessary in the exercise of his right of private defence and again I quote from the same work: —

"(1) A defender need not wait till he is actually attacked.

(2) He is not obliged to run away, the law does not require a citizen to behave like a coward.

(3) A defender may pursue the aggressor. A defender is not only not obliged to retreat but he may even pursue his enemy till he finds himself out of danger.

(4) If the defender is unable to escape, he may turn round and attack.

(5) A defender need not coolly reflect on his right or measure his blows. The law does not require that the accused should have exercised a calm and cool judgment and that he should weigh his acts in golden scales.

(6) A defender can make sure that his defence is effective.

(7) A defender may inflict injuries on his aggressor for the purpose of defence as well as for preventing further aggression. It is not only the injuries already inflicted but the injuries the attacker might inflict if the defender does not exercise his right of self-defence that must be

taken into consideration. Even if the aggressor is disarmed, if there is a possibility of his wresting the weapon from the defender, the latter has a right to use violence, but of course not to cause his death. But he can even cause death if one of the two aggressors is still armed. It would be circumscribing the right of private defence of the body with meticulous and unjustifiable restrictions if it were to be held that, when the person attacked had managed to obtain the weapon from the grasp of the attacker, he was not to be allowed to use that weapon in his defence in order to prevent the attacker from regaining possession of it."
(The underlining is mine.)

In the light of the evidence produced by the prosecution in this case I think there was a reasonable possibility, nay probability, that if the deceased had himself managed to get hold of the knife, he would have struck some blows with the knife on the accused. In the circumstances and in the situation in which the accused found himself there was bound to be in his mind a reasonable apprehension of death or grievous hurt being caused to him by the deceased unless he got out of the reach of the deceased. It is not a case where there was an exchange of abuse between the borrower and the lender when the latter went to the house of the borrower in order to collect the debt and the borrower without any more picked up a knife and stabbed the lender with it. That certainly will be a case of exceeding the right of private defence. *Mehrotra* in his book already cited by me continues to say:

"Where a right of private defence is pleaded the essence of the case should be to ascertain who was the aggressor and whether the accused party acted in the exercise of his right of private defence or otherwise. But he who is assaulted is not bound to modulate the defence step by step according to the attack before there is reason to believe that the attack is over. He is entitled to secure his victory as long as the contest lasts. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if in any conflict between them, he happens to kill, such killing is justifiable. And, of course, when the assault assumed a dangerous form every allowance should be made for one who with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will not be whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.... Under certain circumstances exaggeration of the danger that the accused was facing will not be unreasonable and the law will always make just allowance for the sentiment of the person placed in situation of peril, who has no time to think. His blood then is hot and his sole object is to strike a decisive blow so as to ward off the danger. But courts should not at the same time forget that the right of private defence is a very limited right. It cannot be converted into a right of reprisal."

It is for the party setting up the right of self defence to prove either by independent evidence or from the prosecution evidence or the surrounding circumstances that what he did was in the exercise of his right of self defence. In this case the defence has through the prosecution witnesses proved that the accused was acting in his right of private defence. It is reasonable to suppose that the accused thought in the critical situation in which he was that the deceased might wrest the knife from his hand and use it against him. The reasonable apprehension of death at the hands of the deceased cannot thus be said to have left the mind of the accused. In the circumstances I hold that there is no case to meet. The accused is discharged.

Accused discharged.

Solicitors: *Elyas Majeed & Co.*

PUTEH BIN MAHMOOD v. NG TWEE & ANOR.

[O.C.J. (Sharma J.) November 28, 1970]

[Muar — Civil Suit No. 142 of 1968]

Executors and Administrators — Administration action — Suit brought for benefit of 'parent' — Whether includes 'stepmother' — Civil Law Ordinance, 1956, s. 7.

Civil Law Ordinance, 1956, s. 7 — Definition of 'parent'.

Interpretation of Statutes — Fatal Accidents Enactment, State of Johore (No. 6 of 1930) — Definition of 'parent' — Repeal of Statute (before accident) — Whether position same in the Civil Law Ordinance, 1956.

This action was brought for the benefit *inter alia* of the stepmother of the deceased. The question arose whether a stepmother should be treated for the purpose of the Civil Law Ordinance, 1956, as if she was the mother.

Held: for the purposes of the Civil Law Ordinance, 1956, the term "parent" does not include a stepfather or stepmother.

Case referred to:-

(1) *Free Lanka Insurance Co. Ltd.* v. *Ranasinghe* [1964] A.C. 541.

CIVIL SUIT.

James Chen for the plaintiff.

P. Selvadurai for the defendant.

Sharma J. (delivering oral ruling): The plaintiff as the administrator of the estate of Arshad bin Mahmood has brought this suit and in paragraph 1 of the statement of claim says that the suit is for the benefit of himself, as the brother of the deceased, and for the benefit of his brothers Long bin Mahmood and Kadir bin Mahmood and sister Rahimah binte Mahmood. It is also stated that his stepmother Asmah binte Lembak was a dependant of the deceased and the suit is also for her benefit. Mr. James Chen, counsel for the plaintiff, has told me that the claim under paragraph 1 of the statement of claim is under section 8 of the Civil Law Ordinance which refers to the claim of the estate of the deceased. I am not concerned with who the beneficiaries of the estate of the deceased are. The administrator in his capacity as administrator can always bring a suit on behalf of the estate and in the course of administration it is his duty to administer and distribute the estate. Paragraph 6 of the statement of claim says that it is only Asmah binte Lembak, the stepmother of the deceased, who has suffered loss and damage in that she has been deprived of the pecuniary benefits which she was deriving from the deceased by way of support or maintenance. Mr. James Chen says that the claim under paragraph 6 of the statement of claim is under section 7 of the Civil Law Ordinance 1956. Section 7(2) of the Civil Law Ordinance 1956 says that the suit which is brought "shall